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239-429—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 610

THE FIRESTONE TIRE & RUBBER COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

No. 685

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. F, App. A)[1] is reported at 360 F. 2d 470. The hearing examiner's initial decision (R. 228–247)[2] and the final

[1] "Pet. F" refers to the petition for certiorari filed by Firestone Tire & Rubber Company in No. 610. "Pet. S" refers to the petition filed by Shell Oil Company in No. 685.

[2] "R." refers to the record before the court of appeals in *Shell Oil Company* v. *Federal Trade Commission*. "R[F]." refers to the *Firestone* record. There was only one proceed-

order and opinion of the Federal Trade Commission (R. 248-319) are reported at 58 F.T.C. 371.

JURISDICTION

The judgment of the court of appeals (Pet. F, App. B-1) was entered on April 18, 1966, and a timely petition for rehearing was denied on May 18, 1966 (Pet. F, App. C-1). On August 1, 1966, Mr. Justice Black granted The Firestone Tire & Rubber Company an extension of time within which to file a petition for a writ of certiorari to and including September 30, 1966. Its petition (No. 610) was filed on September 29, 1966. On August 1, 1966, Mr. Justice Black granted the Shell Oil Company an extension of time in which to file a petition for certiorari to and including September 30, 1966. On September 28, 1966, Mr. Justice Black extended this period to and including October 15, 1966. Its petition (No. 685) was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Shell Oil Company, a major distributor and producer of petroleum products, has a sales commission arrangement with The Firestone Tire & Rubber Company under which it sponsors the sale of Firestone's tires, batteries and accessories ("TBA") to Shell dealers. Firestone has similar arrangements

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ing before the Commission, FTC Dkt. No. 6487; both Shell and Firestone participated. Some evidence admitted against one was excluded as to the other. Each filed separate petitions for review in the court of appeals and separate records were printed: *Shell*, C.A. 5, No. 18967; *Firestone*, C.A. 5, No. 18969. For convenience, we confine our references to the *Shell* case, unless otherwise indicated.

with other major oil companies. The Federal Trade Commission held the Shell-Firestone arrangement to be an unfair method of competition under Section 5 of the Federal Trade Commission Act, and prohibited (1) Shell from joining in such plans with any marketer of TBA and (2) Firestone from joining in them with any oil company. The court of appeals affirmed (with one modification) the Commission's order. It held that although the record did not show that Shell had overtly coerced its dealers to handle Firestone TBA, it did show that both companies had exploited Shell's economic dominance over the dealers to cause the latter to purchase substantial amounts of such TBA. The questions presented are:

1. Whether, under the standards of *Atlantic Refining Company* v. *Federal Trade Commission*, 381 U.S. 357, the Commission correctly held that the Shell-Firestone sales commission plan is an unfair method of competition.

2. Whether, in prohibiting Firestone from entering into TBA sales-commission plans with any oil company, the Commission abused its broad discretion to determine appropriate relief.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair * * * acts or practices in commerce, are hereby declared unlawful.

* * * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair * * * acts or practices in commerce.

STATEMENT

This is one of three separate proceedings in which the Federal Trade Commission held that a sales commission arrangement between a major oil company and a leading producer of tires, batteries and accessories ("TBA") was an unfair method of competition. In *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357, this Court sustained the Commission's order against the Goodyear Tire & Rubber Company and the Atlantic Refining Company. In *Federal Trade Commission* v. *Texaco,* 381 U.S. 739, this Court vacated a court of appeals judgment setting aside the Commission's order against B. F. Goodrich Company and Texaco, Inc., and ordered the case remanded to the Commission for reconsideration in the light of *Atlantic Refining.*[1] The instant case involves the arrangement between the Shell Oil Company ("Shell") and The Firestone Tire & Rubber Company ("Firestone").

After a full evidentiary proceeding, the hearing examiner held that the sales commission arrangement

[1] After reconsideration the Commission again issued a cease-and-desist order against the Texaco-Goodyear plan. Petitions for review by the two companies are now under submission in the Court of Appeals for the District of Columbia Circuit (Nos. 20,058 and 20,061), following oral argument on October 12, 1966.

was not illegal but that Shell had coerced its dealers to buy sponsored TBA. He dismissed the case against Firestone but recommended an order prohibiting further coercion by Shell. (R. 228.) On appeals by all parties, the Commission, adopting the examiner's findings as to coercion, unanimously held that the sales commission plan was an unfair method of competition because both companies had exploited Shell's economic dominance over its dealers (R. 253).

A. THE FACTS

THE SHELL-FIRESTONE ARRANGEMENT

Shell is a major integrated producer, refiner and distributor of petroleum products. In 1955 its share of the national gasoline market was estimated at 5 percent. Its products are marketed by 23,000 service stations located in forty-one states and the District of Columbia (R. 268, 2628, 4972). Firestone is the nation's second largest manufacturer of rubber products. In 1957 its share of the national tire market was 17.9 percent. (R[F]. 5193.)

Since 1940 Shell has had sales commission agreements with Firestone and with the Goodyear Tire & Rubber Company, another leading rubber company, to sponsor their TBA among Shell dealers. Firestone also has sales commission arrangements with many large oil companies.* The Shell-Firestone agreement provides that in return for its promotion of Firestone's TBA, Shell will be paid 10 percent of

E.g., Ashland Oil & Refining Co., The Atlantic Refining Co., Champlin Refining Co., Continental Oil Co., D-X Sunray Oil Co., Hancock Oil Co., Jenney Manufacturing Co., Lion Oil Co., Quaker State, The Texas Co., and Union Oil Co. of California (R. 254, 5016).

the net sales value of all Firestone TBA purchased by Shell dealers through designated supply points, and 7½ percent on purchases by wholesale jobbers who supply Shell products to independent retail stations. (R. 264–265, 4364–4367.)

THE SHELL DISTRIBUTION SYSTEM

As of 1957, 5,994 Shell dealers leased their premises from Shell; 3,175 were independent dealers, under annual purchase agreements with Shell; and 1,080 managed company-owned stations as Shell employees for the sale of gasoline, but as independent business men for the sale of TBA and other products (R. 4355). In addition, Shell supplied 847 jobbers, who wholesale Shell products to approximately 13,000 retail service stations (R. 268).

Each Shell dealer signs a Dealer Sales Contract designating Shell as its exclusive supplier of gasoline, oil and grease. There are four classes of dealers:

1. Some dealers lease their station and equipment from Shell, generally on an annual renewal basis. Shell may terminate without cause on thirty days' notice at the end of the term. The lease bars any attachments or additions to buildings without Shell's written consent, thus giving Shell a measure of control over advertising displays required by such facilities. (R. 4387–4388.)

2. Other dealers own their stations, but lease them to Shell as collateral for loans to finance capital improvements; Shell leases them back to the owners, but on thirty days' notice at any time may cancel the arrangement. (R. 4873–4874.)

3. Certain stations are owned by Shell and

operated by managers who, as Shell employees, sell gasoline on consignment for a commission. As to other products, including TBA, this dealer is an independent contractor, limited only by a requirement that he may sell such "merchandise as Shell may approve." Shell may revoke the arrangement on 24 hours' notice (R. 269, 4392–4393). Many potential Shell dealers serve in this capacity for a six to eighteen month period before Shell approves them as regular dealers.

4. Some dealers own or rent their own stations and purchase gasoline from Shell through annual dealer sales agreements, terminable by Shell at the end of each contract year. (R. 4401–4404.)

Jobbers form a separate class. Under purchase contracts of varying duration they purchase gasoline from Shell to be sold at wholesale to retail stations. Shell decides whether a particular retailer is within the jobber's territory. The jobbers' purchase contracts may be terminated at the end of the stipulated period upon 90 days' notice. (R. 4413–4425.)

There is a substantial disparity in the bargaining relationship between Shell and its dealers. The cost of acquiring a site and of constructing a modern service station far exceeds the investment capacity of most gasoline retailers. The oil company, which provides the necessary capital and can afford to establish its own terms for the various arrangements it offers, may be the dealer's landlord, creditor, employer and exclusive supplier. (R. 289–290.) The Commission held that "Shell has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of

overt coercive tactics or of written or oral tying agreements * * *" (R. 296).

THE OPERATION AND COMPETITIVE EFFECT OF THE SHELL-FIRESTONE ARRANGEMENT

Shell and Firestone exploit Shell's dominance over its dealers to promote the sale of Firestone's TBA. When a prospective dealer is being considered for selection Shell officials explain the nature of its TBA arrangements to him and urge that he choose its sponsored products (Firestone or Goodyear) for his TBA supply (R. 734–735, 948, 1130–1131).

Shell promptly notifies Firestone (or Goodyear) and its local supply point of new Shell dealers. This permits Firestone to sign up the new dealer, and obtain his initial order, before competing TBA companies even learn his identity. (R. 2616, R[F]. 2591.)

Once the new dealer has made his selection, Firestone and Goodyear defer to the choice and no longer compete with each other for the station's business[5] (R. 2591; R[F]. 2499). The chosen company assigns the service station to a specific supply point and Shell urges the dealer to purchase all TBA from that assigned outlet. No sales commissions are paid to Shell on TBA purchases from non-designated supply points, even though the brand acquired may be the same (R. 282, 608–610, 4362, 4473–4474).

The Shell salesman is the company's principal con-

[5] The Commission indicated that about 10 percent of Shell's retail stations are assigned to supply points of both Firestone and Goodyear (R. 293).

tact with its service station dealers and Firestone regards him as indispensable to the success of the sales commission plan. He assists the dealer in marketing and merchandising his inventory, including his stock of TBA, and through frequent visits to the station and reports from the central office, he knows precisely how much TBA the dealer purchases under the plan and whether he stocks any non-sponsored TBA (R. 4060–4061, 4762–4764, 4775–4776). Part of the salesman's importance to Firestone lies in the influence his recommendations have with Shell's District Managers when they review the dealer's operation at lease and franchise renewal time (R. 288, 1092).

Much of the promotional work directed towards the dealers is performed by Firestone and Shell salesmen under a system of joint solicitation called "double teaming." The companies acknowledged that this system, used throughout a dealer's term to encourage purchases of sponsored TBA and to discourage excessive merchandising of competing brands, is their most effective promotional device (R. 4567, 4589–4590, 4646).

Newly assigned or prospective dealers are required to attend a comprehensive training and indoctrination program, in which Firestone and Goodyear personnel actively participate. They set up displays of sponsored TBA products and seek to encourage the Shell dealers to purchase them. (R. 1921–1923, 2524–2525.)

Since 1941, Firestone has prepared and distributed an inventory guide to assist stations of varying sizes

in determining the assortment and quantity of TBA to stock. A Firestone representative, accompanied by the Shell salesman, meets with the new dealer to work out a permanent TBA inventory, that is appropriate for that station. The initial order of TBA is usually made at the time the dealership agreement or lease is executed. From time to time, Firestone or Shell salesmen, or both, call on the dealer to check his stock and restore his inventory to the amount he has agreed to maintain (R. 2529–2530, 4611, 4616–4617). If Firestone salesmen encounter any resistance, their company will send a list of the recalcitrant dealers to Shell. And while Shell views the sales of TBA to Shell dealers as principally the task of Firestone salesmen, Shell offers the services of its district salesmen to overcome pockets of dealer resistance (R. 4602–4604, 4751–4752).

The sales commission system has proved highly successful for Shell and the sponsored TBA suppliers. During the nine years from 1949 to 1957, Shell sold nearly $290 million of sponsored TBA [6] and Fire-

[6] Shell sales, 1949–57:

Year	Firestone sales	Goodyear sales	Firestone commissions to Shell	Goodyear commissions to Shell
1949	$8,236,544	$8,592,000	$776,369	$780,831
1950	12,064,813	13,305,000	1,144,072	1,182,120
1951	11,230,684	11,865,000	1,049,472	1,138,076
1952	13,553,957	16,606,000	1,271,170	1,422,122
1953	14,378,854	17,984,000	1,347,147	1,603,786
1954	15,352,956	18,455,000	1,449,966	1,628,175
1955	17,519,433	21,299,000	1,646,621	1,856,072
1956	19,788,937	22,822,000	(1)	(1)
1957	21,002,825	25,838,000	(1)	(1)
Total	133,124,003	156,766,000	8,684,817	9,611,182

(1) Not available.

stone and Goodyear paid sales commissions to Shell of more than $18 million. (R. 235–236, 4356, 4488, 4492–4493.)

The Commission held that the Shell-Firestone arrangement has had substantial adverse effects upon competition in the market for TBA among Shell dealers at the wholesale, retail and manufacturing levels (R. 308–310). Among such effects were the following. Wholesale suppliers of TBA are foreclosed from selling to Shell dealers. Even Firestone wholesalers not designated as supply points under the plan are foreclosed. Firestone and Goodyear do not compete in selling to a dealer once he has chosen one or the other as his supplier. The participating service stations dealers are prevented from exercising for their own business advantage their independent buying power, and the buying public is denied the price savings of competitive rivalry which may be passed on to them (R. 311). Finally, smaller manufacturers cannot compete for the business of large oil companies such as Shell, which operate under a nationwide sales commission plan, because they lack the widespread system of supply points necessary to serve such a plan (R. 300–304).

B. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Fifth Circuit unanimously affirmed the Commission's determination that the Shell-Firestone sales commission plan was an unfair method of competition. It reversed, for lack of substantial evidence, the Commission's findings that Shell had committed overt coercion against its dealers.

Applying the test enunciated by this Court in *Atlantic Refining, supra,* it concluded that the plan violated Section 5 of the Federal Trade Commission Act, because "*[w]ithin the factual context of this case,* Shell (a) had dominant power over its dealers and (b) exerted that power through natural leverage and through control devices in carrying out its TBA sales commission plan, (c) causing adverse competitive effects in a not insubstantial portion of the TBA market" (Pet. F, App. A–32–33, italics in original).

ARGUMENT

1. In upholding the Commission's determination that the Shell-Firestone sales commission plan was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, the court of appeals correctly applied to the facts of this case the criteria enunciated in *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357. The court of appeals properly concluded that there are present in this case the critical elements which sustained the finding of violation in *Atlantic Refining.* The record as a whole supports the Commission's determinations that Shell has sufficient economic power over its dealers to cause them to purchase substantial quantities of sponsored TBA, and that it exercised such power to accomplish that objective (R. 257); that under the plan as it operated wholesalers and manufacturers of competing brands of TBA, as well as non-designated Firestone and Goodyear wholesalers, were foreclosed from a substantial portion of the market represented by the Shell dealers; that Firestone and Goodyear

were foreclosed from selling to each other's participating dealers; and that Shell dealers who participated in the plan were markedly disadvantaged in competing with non-participating dealers who were free to stock several brands of TBA (R. 309–312; Pet. S, App. A–26). *Atlantic Refining* teaches that these factors justified the Commission in concluding that the Shell-Firestone sales commission plan, like the Atlantic-Goodyear plan, had a sufficiently serious adverse impact upon competition to condemn it as an unfair method of competition. See 381 U.S. at 368–371.

The court of appeals correctly sustained the Commission's finding of violation even though it set aside, as without adequate support in the record, the agency's finding "that overt coercion of dealers to buy from sponsored TBA outlets was a prevailing Shell business practice" (Pet. F, App. A–31). This Court's decision in *Atlantic Refining* did not turn on the existence of overt coercion. Rather, as the court of appeals recognized, the fundamental vice of the sales commission system which justified the Commission in condemning it as an unfair method of competition was the oil company's "utilization of economic power in one market to curtail competition in another" (381 U.S. at 369). To be sure, in *Atlantic Refining* the oil company "bolstered" that "lever * * * by actual threats and coercive practices" (*ibid.*). Although this Court recognized the distinction between the oil company's exertion of "persuasion that is a natural incident of its economic power" and "direct and overt threats of reprisal" (*id.* at 368), the touchstone of illegality was not the means by which the oil company

exercises its power, but the possession and use thereof. Nothing in the opinion in *Atlantic* indicates that a sales commission plan having the same anti-competitive effects would be saved from illegality because the oil company could accomplish its objective without overtly coercing its dealers. Cf. *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 594.

Shell asserts that the standard of injury to competition applied in *Atlantic Refining, supra*, 381 U.S. at 371—that a "not insubstantial" volume of commerce be restrained by the restrictive arrangements—depended on a finding that dealers had been coerced into such arrangements (Pet. S. 16). But this Court's opinion speaks primarily of the effects on competition at the wholesale and manufacturing levels as flowing "from the contract itself", not from any particular threats or coercive acts, and those effects primarily were the effective foreclosure of the oil company's wholesalers and retailers rather than the coercion of its dealers (381 U.S. at 370). In the present case, as shown above, the Commission's findings and the supporting evidence justify its conclusion that the Shell-Firestone sales commission plan had a seriously adverse impact on competition (R. 309-312; Pet. S, App. A-26). No more detailed economic inquiry was necessary.[7]

Firestone asks this Court to decide "whether there

[7] Shell's attempt to justify the plans on the basis of their commercial value (Pet. S. 17-18) fails for the same reason that a similar argument failed in *Atlantic Refining*. See 381 U.S. at 371.

is substantial evidence to support the Commission's specific findings of fact" that Shell had economic power over its dealers, which it used to cause them to purchase substantial quantities of sponsored TBA (Pet. F. 7). The court of appeals fully reviewed the record on that issue, however, and upheld the Commission's findings as adequately supported, and there is no occasion for a second review of that factual issue. Moreover, there is no real dispute as to the basic facts found by the Commission, which show that Firestone bought and paid for Shell's influence over its dealers—influence which arose out of Shell's economic dominance over them. Indeed, this Court observed in *Atlantic,* in discussing the scope of the order, that "[i]t is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers * * *." (381 U.S. at 376.)

2. Firestone contends (Pet. F. 10) that the Commission's order is too broad because it prohibits sales commission arrangements with small oil companies that may not have sufficient economic power over their dealers to require the latter to purchase sponsored TBA. The identical argument against the same kind of order was made and rejected in the *Atlantic Refining* case, and it is no more persuasive here. If Firestone wishes to enter into a sales commission program with an oil company that fits within that category, it has the same option that Goodyear had—it "may seek a reopening of the order" (381 U.S. at 377).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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